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SEP 22 1982
ALEXANDER L. STEVAS,
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No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal From the Supreme Court of New Jersey

APPELLANT'S REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTORY STATEMENT

This reply brief is submitted on behalf of the United Building and Construction Trades Council of Camden County and Vicinity, which filed a jurisdictional statement on May 12, 1982, seeking to appeal that portion of a final judgment of the Supreme Court of New Jersey, reported at 88 N. J. 317 (1982), which upheld the validity, under the United States Constitution, of a municipal ordinance enacted by the City of Camden, New Jersey and approved by the State, which requires that at least 40 per cent of the employees hired by private contractors engaged in

public works construction projects for the City be municipal residents for one year prior to employment. The appellant contends that contrary to the holding of the New Jersey Supreme Court, this ordinance violates the Privileges and Immunities, Commerce and Equal Protection Clauses of the United States Constitution. This reply brief is being filed solely to call the Court's attention to its recent decision in *Zobel v. Williams*, — U. S. —, 102 S. Ct. 2309 (1982), and particularly the concurring opinion of Justice O'Connor therein, which addresses, and rejects, the Privileges and Immunities analysis proffered by the appellees in this matter. The appellant incorporates by reference herein, the statement of the case and constitutional arguments discussed in its jurisdictional statement filed previously.

ARGUMENT

I. A Local Ordinance Which Discriminates Against Out-of-State Residents by Denying Them Access to a Significant Portion of Private Employment Construction Jobs on Public Works Projects Is Not Immune From Review Under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State.

In defense of the Camden ordinance, the appellees argue that since the relevant discrimination is between municipal and non-municipal residents, the distinction is not based on state citizenship but between classes of state residents; thus, it is asserted, the Privileges and Immunities Clause is not implicated. Justice O'Connor in her concurring opinion in *Zobel v. Williams, supra*, rejected such a narrow reading of the Privileges and Immunities Clause.

In *Zobel v. Williams, supra*, this Court struck down as unconstitutional an Alaskan plan to distribute a portion of state revenues according to length of residency within the State. Chief Justice Burger, writing for the majority, found such a statute violative of the Equal Protection Clause, as Alaska failed to show any valid state interests rationally related to a distribution scheme based on the duration of state citizenship.

In a concurring opinion, Justice O'Connor would have struck down the statute based upon the Privileges and Immunities Clause. In her opinion, Justice O'Connor rejects the very argument made by the appellees in the instant case, that the Privileges and Immunities Clause applies exclusively to discrimination between residents of different states. Rather, she indicates that the Clause

also applies to discrimination among classes of residents within the same state:

> It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and non-residents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them . . . The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the state on less favorable terms than those who arrived earlier. *The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that 'the citizen of State A who ventures into [Alaska]' to establish a home labors under a continuous disability.* — U. S. at —, 102 S. Ct. at 2321 (emphasis added).

In the case at bar, the fact that some in-state residents as well as all out-of-state residents are disadvantaged does not immunize the Camden ordinance from review under the Privileges and Immunities Clause, as the Camden ordinance classifies job applicants based upon their place of residence. The effect of the ordinance is to deny a significant portion of job opportunities for private employment on public construction projects by reason of an employee's State of residence. It is precisely this kind of discriminatory conduct which is at the core of the Priv-

ileges and Immunities Clause. The discrimination worked against non-New Jerseyans by the Camden ordinance is not eliminated or ameliorated by the fact that other New Jerseyans, who are not residents of Camden, are similarly victimized.

By its very terms, the Privileges and Immunities Clause is not confined to discriminatory actions taken by the States alone, but ensures that no person shall suffer prejudice by reason of his State of residence. The Clause is designed "to place the citizens of each State upon the same footing with citizens of other States, as far as the advantages resulting from citizenship in those states are concerned." *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978).

We have not located a single authority which has held a municipal ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, the Privileges and Immunities Clause has invalidated local ordinances, regardless of the fact that such ordinances may have also burdened other in-state residents. *See e.g.*, *Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance fixing higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (held that ordinance imposing higher licensing fees on non-county residents is invalid under the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives non-residents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182

Pa. St. 630, 38 Atl. 356 (1897) (license fee which exempts peddlers residing in the county violates the constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *Fecheimer v. City of Louisville*, 84 Ky. 306, 309, 2 S. W. 65, 66 (1886) ("the fact that its provisions [of a municipal ordinance] apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it."); *cf., Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents is held to violate both the Privileges and Immunities Clause as well as federal and state equal protection guarantees).

Moreover, in an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 354, n. 4 (1951), that it is "immaterial" that the Madison ordinance which excluded from distribution within the City any milk not locally produced, subjected some intra-state concerns to the same discriminatory treatment as firms from out of state. The critical element in finding impermissible discrimination in *Dean Milk* and in the case at bar is that in both instances all out-of-state residents are subject to discrimination, by being denied access to a local market and selected local residents are beneficiaries of this discrimination, based solely on their State of residence. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden, that some New Jersey residents are also burdened.

The purposes of the Privileges and Immunities Clause are no less implicated when the discrimination is accomplished by means of a municipal ordinance, rather than via a state law. When a municipality acts, it does so by virtue of the measure of state authority with which it is clothed. To permit the City of Camden to enact an ordinance barring all non-New Jersey residents from employment on public works construction projects with the City grants it greater constitutional authority than its parent, the State. Such a result would encourage the enactment of similar ordinances by every municipality within a State to accomplish the same objective which, if effected by a state statute, would be deemed unconstitutional under the Clause. The effects of such discriminatory legislation are as devastating when enacted in piecemeal fashion as when adopted on a state-wide basis. The salutary goals of the Privileges and Immunities Clause would be frustrated if it was rendered impotent by such back-door Balkanization.

In making nonresidency an improper premise for locating a special burden, the Privileges and Immunities Clause implicates "not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U. S. 656, 662 (1975). To permit the adoption of the Camden resident preference merely invites out-of-state municipalities to protect their own residents by enactment of similar protectionist ordinances, even though "to prevent retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Id.* at 662-63.

A municipality may not require private contractors to restrict job opportunities in public works construction projects to its own citizens. To uphold the constitutionality of the Camden resident preference ordinance would significantly compromise the underlying vision of the

Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to deny appellee's motion to dismiss, note probable jurisdiction of this appeal and resolve the substantial federal question submitted herein.

Respectfully submitted,

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